NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

OCT 07 2005

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

P.C. WOO, INC., a California Corporation dba MEGATOYS,

Plaintiff - Appellant,

v.

THE TOKIO MARINE AND FIRE INSURANCE COMPANY, LTD (US BRANCH),

Defendant - Appellee.

No. 03-57205

D.C. No. CV-03-02959-DT

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Dickran M. Tevrizian, District Judge, Presiding

Argued and Submitted September 15, 2005
Pasadena, California

Before: GRABER, McKEOWN, and W. FLETCHER, Circuit Judges.

P.C. Woo, Inc., dba Megatoys ("Megatoys"), appeals the district court's order denying its motion for summary judgment and granting the cross-motion of

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Tokio Marine and Fire Insurance Company, Ltd. ("Tokio Marine"). We have jurisdiction under 28 U.S.C. § 1291 and affirm.

GMA Accesories, Inc., filed suit against Megatoys, alleging copyright infringement and unfair competition. GMA's claims were based on Megatoys' manufacture and sale of non-brand toys that allegedly infringed on works of art created by GMA. Megatoys displayed the alleged infringing products at a Las Vegas trade show between August 20-24, 2000, March 4-8, 2001 and August 12-16, 2001, as well as on the floor of its Los Angeles showroom during August 2000 and September 2001.

Tokio Marine issued a series of commercial general liability ("CGL") policies to Megatoys. These policies are "occurrence" policies rather than "claims-made" policies. The policies define "occurrence" to mean "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." Both CGL policy No. CPP414206300, effective December 15, 1999

to October 1, 2000, and CGL policy No. CPP414352900, effective October 1, 2000 to October 1, 2001, potentially apply to GMA's claims against Megatoys.[1]

Policy No. CPP414206300 does not define the term "advertisement"; the other policy defines "advertisement" to mean "a notice that is broadcast or published to the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters." Both policies provide that "advertising injury," which includes copyright infringement, caused by an offense committed in the course of "advertising" will be covered "but only if the offense was committed . . . during the policy period."

Tokio Marine denied coverage. We need not determine which policy is applicable. Megatoys' alleged infringing conduct does not constitute "advertising" under either policy.

In Hameid v. National Fire Insurance of Hartford, 71 P.3d 761, 764 (Cal. 2003), the CGL policy did not define the term "advertising." The California

[1]Tokio Marine also issued several umbrella policies, which provide coverage for "advertising injury" if an "occurrence," as defined in the umbrella policy, is not covered by the underlying CGL policy of the same period. The umbrella policies define "occurrence . . . with respect to advertising injury" to mean an "offense committed by an insured resulting in advertising injury." The umbrella policies do not define the term "advertising." Megatoys' alleged conduct does not constitute "advertising" under the umbrella policies for the same reasons that it does not constitute "advertising" under the first CGL policy.

Supreme Court adopted what it deemed the "majority approach" to the issue, and interpreted "advertising" to mean "widespread promotional activities usually directed to the public at large." Id. at 766. Megatoys' alleged infringing conduct, which is neither widespread nor directed to the public at large, does not fall within this definition. We are not persuaded that El-Com Hardware, Inc. v. Fireman's Fund Insurance Company, 111 Cal. Rptr. 2d 670 (Ct. App. 2001), a Court of Appeal decision issued a year before Hameid, changes the result.

Nor does Megatoys' alleged infringing conduct fall within the definition of "advertising" in the second CGL policy. See Rombe Corp. v. Allied Ins. Co., 27 Cal. Rptr. 3d 99, 106-07 (Ct. App. 2005) (considering a policy definition of "advertisement" identical to the second CGL policy here and concluding that "[a]ny plain reading of the words 'published' and 'broadcast' include the notion of a relatively large and disparate audience").

AFFIRMED.